BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The decision of the Supreme Court at Special Term is reported in 176 Misc. 1044 and appears in folios 817-830 of the Record on Appeal.

The Appellate Division affirmed this decision on August 4th, 1941 without opinion (226 App. Div. 874).

The Court of Appeals affirmed the decision on April 25th, 1942 without opinion (288 N. Y. (mem.) 95).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended (U. S. C. A. Title 28, Section 344, Paragraph B) which gives this Court jurisdiction to review by certiorari in cases in which a final judgment or decree has been rendered or passed upon by the highest Court of the State in which a decision could be had where any title, right, privilege or immunity is specifically set up or claimed by either party under the Constitution of the United States.

In his opinion at Special Term, Judge Nolan held that the franchises in question constitute property and when once granted cannot be taken away save by the terms therein prescribed or by due process of law (821). He held in effect that the resolution terminating the franchises did not constitute due process of law. Thus a constitutional question is directly raised which it is for this Honorable Court alone to determine.

Argument.

I. It is for the Supreme Court of the United States to determine whether the resolution terminating the franchises constitutes due process.

The exact definition of "due process" is not set forth in either the State or Federal Constitutions and many learned Judges have given different opinions concerning it but all are apparently agreed that "due process" constitutes a definite assurance to every person of an opportunity to be heard, defend and preserve his rights.

The respondent was not deprived of an opportunity to be heard and to defend and preserve its rights.

In fact if we look at the situation from the viewpoint of the petitioner it will be realized that the petitioner was deprived of its property without due process of law by the declaration of the Supreme Court of the State of New York that the consents were perpetual.

The right to the use of the streets and the streets themselves belong to the people of the city. In 1886 permission to use these streets was granted to the respondents by the village trustees. The consents did not state that they were to be perpetual. As a matter of fact they did not contain any time limit at all. In the absence of a specific declaration it should not be construed that the village trustees intended to permanently part with the right to use these streets. Any declaration to that effect is to deprive the petitioner of its property in the streets without due process of law.

The city now wishes to change its outmoded method of transportation and in fact offered the respondents the opportunity to provide the modern method of transportation. The respondents refused and the city took the next logical step to obtain this transportation—it

terminated its consent to use the streets. A denial of this right by the Supreme Court of the State of New York is to deny to the city the right to use its own property as it sees fit. It is a declaration that the city has forfeited all control of its streets in favor of private interests as against the public interests.

II. In the absence of specific provisions to the contrary the consent should be construed in favor of the petitioner.

In passing upon similar consents and franchises the Supreme Court of the United States in the case of *Blair* v. *Chicago*, 201 U. S. 400, held that any rights that are asserted against the State must be clearly defined and plainly expressed and should not be raised by inference or presumption and that if a grant is silent about a right or power it does not exist.

Applying this logic to the case at bar it is submitted that the decision of the Supreme Court of the State of New York was in violation of these principles and that inasmuch as the right to use the streets in perpetuity was not expressly set forth in the consent such a right did not exist.

Judge Day in writing the opinion of the court in the *Blair* case stated at pages 471-472:

> "Since the decision in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629, this court has had frequent occasion to apply and enforce the doctrine that a grant of rights in public property accepted by the beneficiary will amount to a contract entitled to protection against impairment by action of the state, or municipalities acting under state authority. Concurrent with this principle, and to be considered when construing an alleged grant of this character,

is the equally well established rule, which requires such grants to be made in plain terms in order to convey private rights in respect to public property, and to prevent future control of such privileges in the public interest." * * *

"'The rule of construction in cases of this description * * * is this,—that any ambiguity in the terms of the grant must operate against the corporation, and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained and unreasonable interpretation, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded.' In the case of *The Binghamton Bridge* (*Chenango Bridge Co.* v. *Binghamton Bridge Co.*), 3 Wall. 51, 75, 18 L. ed. 137, 143, it was said: 'The principle is this: That all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state.'" * * *

"Applying the principle so frequently asserted and uniformly maintained, we think it cannot be successfully maintained that the act of 1865 contains a clear expression of legislative intention to extend the franchise of these companies to use the streets of Chicago, without reference to the assent of the city, for the long term of ninety-nine years, and for

that time preventing other and different legislation restricting this grant of a practically exclusive right. So enormous a grant of privileges, including an exclusion from some streets of any railway system, ought not to be presumed or held to be conferred in doubtful and ambiguous words. Grants of this character are not to be destroyed by an unreasonable or narrow interpretation. But if ambiguity is fatal to such claim of rights as against the public, for the stronger reason must such grants of far-reaching and exclusive privileges as are here asserted fail when they can only be maintained by strained construction in their favor."

III. The decision of the Supreme Court of the State of New York is not in accord with the applicable decisions of this Honorable Court.

In the case of *Blair* v. *Chicago, supra,* in construing a consent granted to a transportation company which was silent as to the term of the grant the court stated at page 481:

> "In the west side system, the ordinance of August 17, 1864, is silent as to the term of the grant. We do not think this indicates any intention on the part of the city, even if it had the power under legislative acts then in existence, to confer the right in perpetuity to the occupancy of the streets, * * *."

Again in the case of *New Orleans Gas Light Company* v. *Drainage Commission,* 197 U. S. 453, in which case the plaintiff contended that having acquired a franchise for the purpose of laying pipes and conduits in the cities that it had acquired a property right which could not be taken from it without compensation there was nothing in the terms of the grant to the plaintiff to indicate the

intention of the state to give up its control of the public streets as in the case at bar.

The court in the *New Orleans* case held at page 461:

> "It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that changes in location be made.
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> This right of control seems to be conceded by the learned counsel for the plaintiff in error, in so far as it relates to the right to regulate the use of the surface of the streets, and it is recognized that the users of such surface may be required to adapt themselves to regulations made in the exercise of the police power. We see no reason why the same principle should not apply to the sub-surface of the streets, which, no less than the surface, is primarily under public control."

CONCLUSION.

In view of the foregoing it is respectfully submitted that the petition for the issuance of a writ of certiorari be granted.

Respectfully submitted,

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Opinion Rendered by Trial Justice Nolan, Reported in 176 Misc. 1044.

The New York Law Journal, December 2, 1940.

City of New Rochelle v. *Westchester Elec. RR.*—The defendant Westchester Electric Railroad Company operates a street railway line known as the New Rochelle-Subway, or "A" line, from the northerly terminal of the subway on White Plains Road at Two Hunrded and Forty-second Street, in the Borough of the Bronx through the City of Mount Vernon, the villages of Pelham Manor and Pelham and the City of New Rochelle, to a terminal at or near the New Rochelle station of the New York, New Haven & Hartford Railroad Company. The portion of the route of this line within the City of New Rochelle is upon streets covered by franchises granted to the Westchester Electric Railroad Company and to predecessor companies, namely the New Rochelle Street Horse Railroad Company, the New Rochelle & Pelham Railway Company and the New Rochelle Railway & Transit Company. On March 6, 1939, the Council of the City of New Rochelle adopted a resolution purporting to terminate the consents and franchises granted to the defendant and its predecessors in interest for the operation of the "A" trolley lines, directing the defendant to cease operating the "A" trolleys, and authorizing the commencement of an action if the defendant should fail so to do. This action grows out of the refusal of the defendant Westchester Electric Railroad Company to cease such operation.

The franchises in question are unlimited as to term or duration.

It is claimed by the plaintiff that the franchises in question may be terminated at will, since public convenience and safety require such termination. In support of the allegations of the complaint as to the necessity of such termination the plaintiff has introduced evidence

to the effect that considerable congestion exists in the streets over which the "A" line runs, caused by the trolleys and by automobile traffic and parking. Undoubtedly the elimination of the "A" trolleys would improve conditions considerably. It may be that conditions might be likewise improved by regulation of defendant's operations, and of traffic and parking in the areas where congestion has resulted. Plaintiff does not seek to regulate, however, but seeks to terminate entirely the franchises heretofore granted.

Plaintiff's difficulty lies in the fact that the franchises in question are unlimited as to time or duration. Such franchises constitute property. When granted they cannot be taken away save by the terms therein prescribed or by due process of law. (*People* v. *O'Brien*, 111 N. Y. 1; *City of N. Y.* v. *N. Y. Central RR.*, 234 N. Y. 113; *N. Y. & Queens Electric Light & Power Co.* v. *City of N. Y.*, 221 App. Div. 544; *Coney Island, Fort Hamilton & Brooklyn RR.* v. *Kennedy*, 15 App. Div. 588; *Eighth Ave. Coach Corp'n.* v. *City of N. Y.*, 170 Misc. 243.) Under the settled law of the state the defendant has a property right in its franchises, from the enjoyment of which it cannot be excluded without compensation. If public necessity requires its exclusion the result can be accomplished by purchase or by condemnation (*Coney Island, Fort Hamilton & B'klyn. RR.* v. *Kennedy*, supra). Plaintiff contends that the franchises have been forfeited by nonuser and by failure to file the bonds required. These allegations of the complaint have not been established by the evidence.

A question arises, however, with respect to certain portions of the defendant's line which are operated pursuant to franchises granted to predecessor companies. The defendant claims the right to these franchises by virtue of the surrender by the New Rochelle Railway and Transit Company of all of its capital stock to Westchester Elec-

tric Railroad Company by certificate dated May 31, 1893, filed and recorded in the office of the Secretary of State. The certificate of such surrender, produced on the trial states that it was given and filed in pursuance of section 79 of the Railroad Law of 1892. The statute then in effect (chap. 565, Laws of 1890, amended by Laws of 1892), provided that any railroad corporation, being the lessee of the road of any other railroad corporation, might take a surrender or transfer of the capital stock of the corporation whose road was held under lease, and that whenever the whole of such capital stock was so surrendered, and a certificate thereof was filed, the franchises of the corporation whose stock had been so surrendered thereupon vested in the corporation to which such surrender had been made. No provision was made by the statute for such a transfer to or the vesting of such property in a railroad corporation which was not a lessee. The plaintiff now contends that no proof has been presented that the defendant at the time of the acquisition of the stock of its predecessor company, was a lessee of the road operated by it. This question was not litigated on the trial. The franchises of the predecessor companies and the certificate of the surrender of capital stock were annexed to plaintiff's complaint and received in evidence without objection. The certificate states that it was given pursuant to the statute. Since the statue makes no provision for a transfer of stock to any corporation other than a lessee the natural inference from the evidence presented is that at the time of the transfer the defendant was a lessee of its predecessor company. The fact that the franchises of the predecessor companies were held by the defendant appears to have been recognized by the plaintiff by the contract between the parties dated December 27, 1905, and received in evidence as defendant's Exhibit "C". On the evidence presented it may not be decided that the defendant is operating on Main Street between Center Avenue and North Avenue, and on Huguenot Street between Center Avenue and North Avenue, without a fran-

chise. No franchise has been produced for the operation of defendant's line on Bridge Street between Huguenot Street and Railroad Place. It appears from the evidence presented, however, that the operation of defendant's line on Bridge Street was approved by the plaintiff by agreement between the plaintiff, the defendant, and the New Haven Railroad Company dated April 21, 1905 (defendant's Exhibit "N"), and the blueprint attached to that agreement shows an existing track on Bridge Street. Under the circumstances and in the absence of other evidence, it must be presumed that a consent to such operation was obtained (*Railroad Law*, sec. 171; *People ex rel. City of N. Y.* v. *N. Y. R'ys.*, 217 N. Y. 310).

The complaint, in so far as it seeks an injunction restraining operation of the defendant's "A" line, is dismissed, but since proof may be available as to the nature of defendant's rights with respect to its operation on Main and Huguenot Streets, between Center Avenue and North Avenue, and on Bridge Street, between Huguenot Street and Railroad Place, without prejudice to another action with respect to such portions of defendant's "A" line. The judgment may declare that the defendant Westchester Electric Railroad Company has the right to continue its operation of said line by virtue of the consents referred to in the complaint and marked Exhibits Nos. 1, 2, 9, 10 and 11, and that such consents were not terminated by the resolution of March 6, 1939. On the evidence presented the court will not declare the rights of the parties with respect to the consents referred to in the complaint and marked Exhibits Nos. 4, 5, 6 and 7. Settle decision and judgment on notice.